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In the

Supreme Court of the United States

October Term, 1996

MARYLAND STATE DEPARTMENT OF EDUCATION,
DIVISION OF REHABILITATION SERVICES,

Petitioner,

v.

UNITED STATES DEPARTMENT OF VETERAN AFFAIRS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The following question arises out of the failure of the United States Department of Veteran Affairs to include in a building it constructed a site for the location and operation of a vending facility by a blind person:

Does the Randolph-Sheppard Act, which vests arbitration panels with the authority to determine whether the acts and practices of federal agencies are in violation of the Act, also authorize panels under 20 U.S.C. § 107d-2(b) to order federal agencies to remedy such violations?

PARTIES TO THE PROCEEDING

The parties to the proceeding below were the Maryland State Department of Education, Division of Rehabilitative Services (appellant below); the United States Department of Veterans Affairs; Jesse Brown, Secretary of the Department of Veteran Affairs; John T. Farrar, Under Secretary for Health, Department of Veteran Affairs; Michael B. Phaub, Director, Veterans Affairs Medical Center (appellees below); the National Federation of the Blind; and Donald J. Morris (intervenors below).

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PETITION FOR A WRIT OF CERTIORARI

The Maryland State Department of Education, Division of Rehabilitative Services ("MSDE") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The October 22, 1996 opinion of the United States Court of Appeals for the Fourth Circuit is reported at 98 F.3d 165 and is reproduced in the Appendix ("App.") at 1a-14a. The court of appeals' December 31, 1996 order denying petitioner's request for rehearing and suggestion for rehearing in banc is unreported and is reproduced at App. 15a-16a. The August 17, 1995 opinion of the United States

District Court for the District of Maryland is reported at 896 F.Supp. 513 and is reproduced at App. 17a-31a. The May 4, 1994 opinion and award of the arbitration panel is reported at 60 Fed. Reg. 55007 and is reproduced at App. 32a-39a. The October 15, 1994 final award of the arbitration panel is unreported and is reproduced at App. 40a-45a.

JURISDICTION

The court of appeals' opinion and judgment were entered on October 22, 1996. The order denying petitioner's timely filed petition for rehearing and suggestion for rehearing in banc was entered on December 31, 1996. This petition is filed within 90 days of that order. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 20 U.S.C. §§ 107-107f. The text of these provisions is reproduced at App. 46a-64a.

STATEMENT OF THE CASE

This petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit, which holds that an arbitration panel convened by the federal Department of Education under the Randolph-Sheppard Act, 20 U.S.C. §§ 107-107f, has no authority to require a recalcitrant federal agency to take specific measures to cure its violation of the Act's affirmative command to allow blind vending facilities on its premises.

The Randolph-Sheppard Act was enacted in 1936 to provide employment for the blind on federal property by giving licensed blind persons the opportunity to become self-supporting through the management of vending facilities in federal buildings. For over 60 years, the Act has worked well in Maryland with the cooperation of federal

agencies, with the result that 53 of the 84 blind vending facilities in Maryland are on federal property. (J.A. 77, ¶3.)[1] One notable exception in Maryland, as throughout the United States, has been the Department of Veterans Affairs ("VA"). (J.A. 80, ¶16; 86-88.)[2]

The Act vests responsibility for interpreting and enforcing its provisions in the Secretary of Education, *see* 20 U.S.C. § 107a(a), who is authorized to designate a public agency in each State to perform a number of functions concerning the administration of the Act, including issuing licenses to blind persons for the operation of vending facilities on federal property in that State. *See* 20 U.S.C. § 107a(a)(5); 34 C.F.R. § 395.7. MSDE is the designated State licensing agency in Maryland that is responsible for carrying out these functions.

The Act requires that every newly-acquired federal government building contain a satisfactory site for a blind vendor's facility, and that the plans for the construction or substantial alteration or renovation of a building include a satisfactory site for a blind vendor's facility. *See* 20 U.S.C. §107a(d). The Act also requires the occupying federal agency to provide advance notice to the State licensing agency responsible under the Act for issuing licenses to blind persons of its plans to occupy, acquire, renovate or relocate a building "adequate to permit such State agency to

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[1] References to "J.A." are to the Joint Appendix filed in this case in the court of appeals.

[2] The record in this case reflects that the only blind vending facility operating on VA property is at the VA Medical Center in St. Cloud, Minnesota. That facility has been the subject of extensive litigation. *See, e.g., Minnesota Dept. of Economic Security v. Riley*, __ F.3d __, 1997 WL 78402 (8th Cir. Feb. 26, 1997).

determine whether such building includes a satisfactory site or sites for a vending facility." *Id.*, § 107a(d)(1).

In this case, the VA began construction of a new Veterans Affairs Medical Center ("VAMC") in Baltimore, Maryland, in August, 1987; space allocation in the building was completed in 1989. (App. 5a.) The VA never gave notice to MSDE, the State licensing agency designated to administer the blind vendor program, of the VA's intent to construct and occupy a new building, either before or after construction was completed, nor did it make any provision for a blind vendor's facility. (App. 18a.)

Although never notified by the VA, MSDE became aware of the federal construction project and, on December 2, 1991, applied to the VA for a permit to operate a Randolph-Sheppard vending facility at the new VAMC Baltimore. (App. 5a; 18a.) After two additional inquiries by MSDE, the VA finally responded on April 6, 1992 by denying MSDE's request for a permit. (*Id.*) While the Act requires that one or more blind vending facilities be established on *all* federal property, it permits an affected federal agency to limit the placement or operation of a blind vending facility if it would adversely affect the interests of the United States. *See* 20 U.S.C. § 107(b); *see also* 34 C.F.R. § 395.30. To be granted such a limitation, however, the federal agency is required to submit a request to, and to obtain the approval of, the Secretary of Education. *Id.* The VA neither requested nor obtained a determination from the Secretary of Education approving the VA's refusal to place a blind vending facility at VAMC Baltimore. (App. 35a.)

The VA completed construction in July, 1992 and occupied the building in January, 1993, by transferring patients and staff from an existing VA medical facility in Baltimore. (App. 33a.) The new facility is two and one-half times larger than the old facility, and treats a

significantly greater number of patients with a larger staff. (*Id.*) While it does not have a site for blind vendors, the VAMC Baltimore does contain three concessions -- a cafeteria, a retail store, and vending machines -- that are operated by the Veterans Canteen Service and occupy a total of 20,000 square feet. (*Id.*)

The Act contains a dispute resolution system that provides that a State licensing agency may file a complaint with the Secretary of Education requesting arbitration whenever the agency "determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of this chapter or any regulations issued thereunder (including a limitation on the placement or operation of a vending facility . . . and the Secretary's determination thereon). . . ." 20 U.S.C. § 107d-1(b). Upon receiving such a complaint, the Secretary of Education is directed to "convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter." *Id.*

MSDE filed such a complaint and the Secretary convened an arbitration panel consisting of three members -- one chosen by the licensing agency, one chosen by the federal property managing agency, and the third designated by the first two members -- which, pursuant to 20 U.S.C. §107d-2(a), held an evidentiary hearing and rendered a decision in accordance with 5 U.S.C. §§ 551-559 of the Administrative Procedures Act. The panel unanimously ruled in MSDE's favor, finding that the Randolph-Sheppard Act applies to VA medical centers, that the Act requires each new federal building to include a satisfactory site for a blind vending facility unless the Secretary of Education finds that this would adversely affect the interests of the

United States, and that the VA had not applied for an exemption from any of the Act's requirements. (App. 34a-38a.) To remedy the VA's statutory violations, the panel ordered the parties to enter into negotiations leading to a permit that would allow a licensed blind vendor to operate a vending facility at VAMC Baltimore. (App. 39a.) The panel further held that if the parties could not agree upon a permit, the parties were to submit proposed permit terms to the panel for its consideration. (*Id.*)

Although the panel's order gave the VA an opportunity to offer adequate space for a vending facility, the VA refused to enter into any negotiations whatsoever with MSDE. (App. 5a; 19a-20a.) Moreover, while MSDE submitted a timely proposed permit to the panel, the VA filed nothing other than a motion for reconsideration. (*Id.*)

On October 15, 1994, the panel issued a final award granting MSDE a permit to operate a vending facility at the VAMC Baltimore in accordance with the terms that MSDE submitted in its proposed permit. (App. 40a.) Because the VA had refused to participate in negotiations or to submit a proposed permit describing any acceptable sites within the VA, the arbitration panel was guided only by the VA's sworn testimony at the hearing. The VA's witnesses testified there that there *was no more space* in the VAMC Baltimore which could be allocated to a blind vending facility without dislocating medically related operations, and that the VA did not wish to allocate any additional space in VAMC Baltimore to a retail facility.[3] The panel

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[3] Michael W. Neusch, then Acting Medical Center Director, testified that allocation of even 250 square feet of space to a blind vending facility "would have a deleterious effect on patient care. . . .It would be my decision not to give up any space until all

(continued...)

thus ordered the VA to turn over operation of one of the three concessions at VAMC Baltimore, the retail store, to the licensing agency. (App. 41a.)

20 U.S.C. § 107d-2(b)(2) provides that if a panel "finds that the acts or practices of any [federal] department, agency or instrumentality are in violation of this chapter," then "the head of any such department, agency, or instrumentality shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel." Notwithstanding this statutory obligation, the VA simply ignored its duty to carry out the decision of the panel. (App. 6a; 20a.) Indeed, the VA refused to comply with the terms of the award or to provide any assurances of future compliance, even though the arbitration panel's decision is "final and binding" on federal agencies, *see* 20 U.S.C. § 107d-1(b), and MSDE made repeated efforts to resolve this dispute without judicial intervention.[4]

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[3](...continued)
of the clinical programs [needs] were met." (J.A. 69-71.) Dorothy Ann Snow, then acting Chief of Staff, testified that "it would be over my dead body if they expanded" space for retail services because "we have both clinical patient care area shortages and administrative shortages for office space for support systems." (J.A. 64-65.) The chief engineer at VAMC Baltimore, Richard Iafolla, also testified that the allocation of 500 square feet for a new vending facility would require the dislocation of other operations at the medical center. (J.A. 60-61; 58-59.)

[4] In response to an inquiry from United States Senator Barbara Mikulski, the VA stated that it would not comply with the Randolph-Sheppard Act, notwithstanding that its asserted legal basis for doing so had been rejected by the Court of Appeals for the Eighth Circuit. (J.A. 86-88.)

Because the VA had not taken such "action as may be necessary to carry out the decision of the panel" as required by § 107d-2(b) of the Act, MSDE sought enforcement of the arbitration panel's award in the U.S. District Court for the District of Maryland. The district court had subject matter jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1361. MSDE sought an order from the district court requiring the VA to comply with the arbitration panel's order. (App. 6a.) In the alternative, MSDE sought an order requiring the VA to comply with the Act by providing MSDE with a satisfactory site for a blind vending facility. (*Id.*)

After suit was filed, and despite its previous sworn testimony in arbitration that another retail facility at VAMC Baltimore could exist *only* by dislocating patient care operations, the VA for the first time identified alternative space in the VAMC and then sought to have the District Court review its proposal, rather than enforce the panel's decision, by calling its proposed sites a "final order" subject to APA review. (App. 6a.) MSDE declined the VA's offer because the proposed sites (currently being utilized as storage closets) could not provide a self-supporting income to a licensed blind vendor. (J.A. 186-89.) MSDE was able to identify a conference room that was of sufficient size and accessibility to support a vendor. The VA refused this counteroffer. (App. 21a-22a.)

After the parties filed cross-motions for summary judgment, the district court entered judgment for the VA. 896 F. Supp. 513 (D. Md. 1995) (App. 17a). The court held that it could not order compliance with the arbitration panel's order because the panel had no authority under the Randolph-Sheppard Act to award a specific remedy. The court found that while the arbitration panel could "review the agency action and determine if that action violates the Act," the panel could not do anything more because "under

the statute, it is the role of the agency head, in this case the Secretary of Veteran Affairs, to remedy any violation of the Act." (App. 26a.). Thus, the district court held that the Act places sole responsibility for remedying a violation with the federal entity that committed the violation. (App. 26a-27a.)

The court of appeals affirmed. 98 F.3d 165 (4th Cir. 1996) (App. 1a.) Asserting that the result that the district court reached was compelled by the "plain language" of § 107d-2(b)(2), the court stated that this statutory provision authorizes the arbitration panel only to "determine whether the federal entity is in violation of the Act, while the head of the federal entity will remedy the violation." (App. 9a-10a.) In reaching this holding, the court stated that it would "decline to follow the District of Columbia Circuit's interpretation of § 107d-2(b)(2)" in *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90 (1986), in which the court of appeals in that case concluded that an arbitration panel had broad -- as opposed to no -- remedial powers under the same statutory provision. (App. 12a.) Rejecting MSDE's contention that the interpretation adopted in *Weinberger* avoids absurd results, the court of appeals below held that "if a state licensing agency is dissatisfied with the response of a federal entity to an arbitration panel's decision, the state agency can file another complaint with the Secretary and have a second arbitration panel determine whether the federal entity's acts in response to the first decision bring it into compliance with the Act." (App. 12a-13a.) The court found that although "this solution may seem cumbersome," it is "dictated by the plain language of the statute." (App. 13a.)

The court of appeals subsequently granted the motion to intervene of the National Federation of the Blind and a licensed blind vendor, and denied MSDE's and the intervenors' petitions for rehearing and suggestions for rehearing in banc. (App. 15a.)

REASONS FOR GRANTING THE WRIT

This case presents issues of overriding legal and social significance that fundamentally affect the rights of blind citizens across the nation. Congress passed the Randolph-Sheppard Act, as set forth in the first sentence of this landmark legislation, "[f]or the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting. . . ." 20 U.S.C. § 107(a). The arbitration provision at issue in this case was subsequently enacted as one of several measures to ensure the attainment of these important goals and to maximize the benefits that blind persons are eligible for under the Act. The court of appeals' decision calls into question the effectiveness of this enforcement mechanism's application in innumerable situations, and seriously threatens an essential tool that lies at the heart of the Act.

Congress's enactment of § 107d-1(b)(2) reflects its recognition of the significance that arbitration serves in carrying out the broad purposes of the Act, and in eradicating widespread abuses that had been found to exist throughout the blind vendor program. This provision established, for the first time, a means for challenging federal agency decisions that adversely affected the location of blind vendor facilities on federal property. That recourse has now been eliminated. As a result, no device exists to enforce the Randolph-Sheppard Act against a defiant federal agency.

Worse, countless blind vendors throughout the country will be affected by this decision. The Act's reach is as broad as its sweep: it applies to every "department, agency, or instrumentality of the United States" that undertakes "to acquire by ownership, rent, lease, or to otherwise occupy,

in whole or in part, any building. . . ." 20 U.S.C. § 107a(d)(1). The rationale of the court of appeals' decision thus extends far beyond the Veterans Administration, the agency directly involved in this litigation, and provides a road map to other federal agencies on how they, too, may avoid complying with the Act without incurring any penalty. Certiorari is warranted to clarify both the applicability of this Court's prior decisions and Congress's intent in enacting this vitally important component of the Randolph-Sheppard Act.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS FASHIONING REMEDIES FOR VIOLATIONS OF FEDERAL LAW.

In holding that an arbitration panel has no authority to remedy a federal agency's unlawful refusal to comply with its obligations under the Act, the court of appeals has fashioned a rule that vests exclusive remedial authority with the perpetrator of that statutory violation. That rule is based on a serious misreading of the Randolph-Sheppard Act and a complete disregard of the presumption applied in this Court's decisions approving remedies when findings have been made that federal law has been violated.

Section 107d-2(b)(2) of the Act in pertinent part provides that when an arbitration panel finds that a federal agency has violated the Act, "the head of any such . . . agency . . . shall cause such acts to be terminated promptly. . . ." The court of appeals interpreted this language to mean that a federal agency that violates the Act has sole responsibility and discretion to end that violation, and, conversely, that the arbitration panel that finds the agency in violation of federal law has no authority to order the agency to remedy its unlawful actions. This interpretation substantially departs from, and directly

conflicts with, this Court's precedents.

This Court has recognized as a "general rule that all appropriate relief is available in an action brought to vindicate a federal right when Congress has given no indication of its purpose with respect to remedies." *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 68 (1992). Applying this general rule, this Court has stated that it will "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise," *id.* at 66 (*citing Davis v. Passman*, 442 U.S. 228, 246-47 (1979)), and accordingly has "regarded the denial of a remedy as the exception rather than the rule." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 375 (1982). The court of appeals erroneously reversed "the traditional presumption in favor of all appropriate relief," *Franklin v. Gwinnett County Public Schools*, 503 U.S. at 69, because this case presents the general rule, not the exception.

The plain language of § 107d-2(b) vests arbitration panels with broad authority to issue decisions that ensure compliance with the overall goal of the Act that "priority shall be given to blind persons." 20 U.S.C. § 107(b). Rather than limit the power of arbitration panels to order remedial relief as the court of appeals held, the relevant portion of § 107d-2(b)(2) explicitly directs a delinquent federal agency to cease its violations of the Act "promptly" *and* to "take such other action as may be necessary to carry out the decision of the panel." *Id.* If, as the court of appeals held, the arbitration panel's authority extended only to stating whether the particular conduct of the agency violated the Act, there would be nothing for the agency to "carry out," *i.e.*, "to put into practice or effect" or "to follow or obey." *American Heritage Dictionary of the English Language* (1982) at 207. Such an interpretation contravenes the unambiguous wording of the Act and the

usual rule that when a finding is made that federal law has been violated, then a court "may use any available remedy to make good the wrong done." *Franklin v. Gwinnett County Public Schools*, 503 U.S. at 66 (*quoting Bell v. Hood*, 327 U.S. 678, 684 (1946)).

When read in conjunction with other provisions of the Randolph-Sheppard Act, § 107d-2(b) makes clear, as one court has noted, that "the Secretary of Education has broad remedial powers under the Act." *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d at 109. Section 107d-1(b), which governs the arbitration of disputes between a State licensing agency and a federal agency, places no limits on an arbitration panel's powers to decide and resolve disputes presented to it. Rather, this section provides that in resolving such disputes, "the decision of [such] panel shall be final and binding on the parties except as otherwise provided in this chapter." While § 107d-2(a) provides that the panel's decision "shall be subject to appeal and review as a final agency action" for purposes of chapter 7 of Title 5 of the United States Code, the latter establishes that a federal agency is not a "person" entitled to judicial review of final agency actions. *See* 5 U.S.C. §§ 702; 701(b)(1); 551(2). Consequently, a federal agency such as the Veterans Administration does not have the right to appeal, and is conclusively bound by, an arbitration panel's decision.

Thus, as the District of Columbia Circuit has found, the Secretary's "authority under the Act to provide *post hoc* remedies is broad." *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d at 109. Accordingly, if the Secretary "finds that the lack of notice here resulted in injury under the Act, the Secretary ought to be able to fashion an appropriate remedy, e.g., require the . . . Department to afford a blind vendor an opportunity at some, or all, sites." *Id.* Similarly, "if a violation is found, the

Secretary might well be able to require the government entities to place blind vendors somewhere on the entire property at issue, or require the specific buildings at issue to contain a satisfactory site for a blind vendor." *Id. See generally Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

Disagreeing with the District of Columbia Circuit's interpretation of § 107d-2(b)(2), the court of appeals below instead expressed its approval of the Eleventh Circuit's decision in *Georgia Dept. of Human Resources v. Nash*, 915 F.2d 1482 (1990), in which the court stated that the arbitration panel "may determine that certain of the federal entity's acts violate the Act, but the Act leaves responsibility for remedying the violation to the federal entity itself." *Id.* at 1492. As the court below conceded, however, under this interpretation, "a federal entity can simply refuse to remedy the violations found by a § 107d-1(b) panel" and the States would be "left without . . . a review. . . ." (App. 12a.) This result runs directly counter to "the traditional presumption in favor of any appropriate relief for violation of a federal right." *Franklin v. Gwinnett County Public Schools*, 503 U.S. at 73.

In casting this presumption aside, the court of appeals' decision contravenes the well-settled principle that "[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). The court of appeals' interpretation of the Act sanctions an enforcement scheme that is not merely "cumbersome" as the court acknowledged (App. 13a), but that will also inevitably "produce absurd results," *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982), in

virtually every dispute that arises under the Act between a State licensing agency and a federal agency.

As a result of the court's holding that an arbitration panel has no authority to order a federal agency to remedy its violation of the Act, the States have no means of preventing the federal government from avoiding its obligations in complying with the blind vendor program. Indeed, a State would have no redress under the Act even when a federal agency has acted as the VA has in this case by first ignoring the Act, and then by disregarding the decision of an arbitration panel convened by the Secretary of Education in response to a complaint that the State agency has filed against the federal agency. In such a case, the sole "remedy" for the State, according to the court of appeals, is to file another complaint with the Secretary and to request that another arbitration panel determine whether the federal agency's actions in response to the first panel decision have brought it in compliance with the Act. By simply continuing to make inadequate offer after inadequate offer, as the VA seems intent in doing in this case, the federal agency can avoid the Act altogether, without ever complying with any of its provisions. It is hard to imagine a more nonsensical and absurd enforcement scheme.

This is precisely the kind of abusive disregard of the Act that Congress intended to eliminate by passing the arbitration provision set forth in § 107d-2(b). From its inception in 1936, the Randolph-Sheppard Act was prevented from achieving its full potential, primarily because of substantial obstacles that federal agencies and federal employees erected. In an effort to remove these hurdles, Congress amended the Act, first, in 1954, and then again in 1974 by enacting § 107d-2(b) (among other provisions), to remedy these "widespread abuses of the blind vendor program. . . ." S.Rep. No. 1297, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373,

6397-98.

The court below agreed that the arbitration provision's legislative history "indicates that Congress intended to provide a final resolution of disputes arising from the administration of the Act," but then dismissed the significance of this history, stating that "it does not clearly express Congress' intent that the resolution of every facet of these disputes -- that is, both the fact of a violation and the appropriate remedy -- should lie with the arbitration panel." (App. 13a.) Congress recognized, however, that the authority granted to the Secretary of Education (then Health, Education, and Welfare), from whom the panel derives its authority, would result in "some incursion by that department in matters traditionally handled by other agencies." S.Rep. No. 937, 93d Cong., 2d Sess. 19 (1974). Congress nevertheless found that this federal department "has the expertness and the sensitivity to the problems inherent in the blind vendor program which may be lacking in other agencies. If the program is to be coordinated, well run, and consistent, it must have a coordinator. The only possible choice for this function is HEW." *Id.*

The legislative history of the Randolph-Sheppard Act thus runs counter to the court of appeals' conclusion that Congress meant to give an arbitration panel no authority to remedy a federal agency's violation of the Act. The court's disregard of that history and the Act's plain language has thrown the law, State licensing agencies, and blind vendors throughout the country into a state of confusion.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

Review is also warranted because the court of appeals' decision conflicts with decisions of other federal appellate courts. First, the court below expressly acknowledged that such a conflict exists, stating that it would "decline to follow" (App. 12a) the court of appeals in the District of Columbia Circuit, which recognized that the Secretary of Education, and thus an arbitration panel that he convenes, has "broad remedial powers" to ensure that a party aggrieved by a federal agency will receive "full relief." *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d at 109.

Second, the court's rejection of *Weinberger* in favor of the decision of the United States Court of Appeals for the Eleventh Circuit in *Georgia Dept. of Human Resources v. Nash*, 915 F.2d 1482 (1990), creates a result that conflicts with a recent decision of the court of appeals in the Eighth Circuit. Relying on *Nash*'s holding that § 107d-2(b)(2) "does not authorize the arbitration panel to order the federal entity to take any remedial action," 915 F.2d at 1492, the court below concluded that a federal agency can simply refuse to remedy violations that an arbitration panel finds. (App. 10a-13a.) That conclusion cannot be reconciled with the subsequent holding of the United States Court of Appeals for the Eighth Circuit that a federal agency may neither "insist[] on a permit condition at odds with the [Arbitration] Panel's decision" nor "ignore[] its statutory responsibility to bring itself into compliance with the Act." *Minnesota Dept. of Economic Security v. Riley*, __ F.3d __, 1997 WL 78402 at *2 (Feb. 26, 1997).

Third, courts of appeals reviewing disputes between blind vendors and State licensing agencies have stated that,

in contrast to the decision below, an arbitration panel's authority under 20 U.S.C. § 107d-1(a) is broad and includes traditional remedial powers. *See Delaware Dept. of Health and Social Services v. U.S. Dept. of Educ.*, 772 F.2d 1123, 1136 (3rd Cir.1985) ("[T]here is not one iota of legislative history suggesting that, insofar as it dealt with the relief which arbitrators could award, the term [arbitration] was understood by any member of Congress to have any meaning other than the conventional one."); *Tennessee Dept. of Human Services v. U.S. Dept. of Educ.*, 979 F.2d 1162, 1165 (6th Cir.1992) ("We . . . conclude that the arbitration panel did not exceed its statutory authority in finding that Hinton [the aggrieved blind vendor] was entitled to retroactive relief against the state agency."). *See also McNabb v. U.S. Dept. of Educ.*, 862 F.2d 681 (8th Cir.1988), *cert. denied*, 493 U.S. 811 (1989).

Review is warranted to resolve these conflicts between the court of appeals' decision and the law of other circuits.

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit. Following review, the judgment should be reversed.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARYLAND STATE DEPARTMENT OF EDUCATION, Division of Rehabilitation Services,
Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF VETERANS AFFAIRS; JESSE BROWN, Secretary, Department of Veterans Affairs; JOHN T. FARRAR, Under Secretary for Health, Department of Veterans Affairs; MICHAEL B. PHAUP, Director, Veterans Affairs Medical Center,
Defendants-Appellees.

NATIONAL FEDERATION OF THE BLIND,
Amicus Curiae.

No. 95-2626

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frank A. Kaufman, Senior District Judge
(CA-95-8-K)

Argued: September 24, 1996

Decided: October 22, 1996

Before ERVIN, HAMILTON, and LUTTIG, Circuit Judges.

Affirmed by published opinion. Judge Hamilton wrote the opinion, in which Judge Ervin and Judge Luttig joined.

COUNSEL

ARGUED: Carmen Mercedes Shepard, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Baltimore, Maryland, for Appellant. William Charles Gleisner, III, GLEISNER LAW OFFICES, S.C., Milwaukee, Wisconsin, for Amicus Curiae. Stephen Woolman Preston, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF**: J. Joseph Curran, Jr., Attorney General, Caroline E. Emerson, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Baltimore, Maryland, for Appellant. Kenneth M. Zuber, GLEISNER LAW OFFICES, S.C., Milwaukee, Wisconsin, for Amicus Curiae. Frank W. Hunger, Assistant Attorney General, Lynne Ann Battaglia, United States Attorney, William Kanter, Jetfrica Jenkins Lee, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

OPINION

HAMILTON, Circuit Judge:

The issue in this case is whether an arbitration panel, convened pursuant to § 107d-1(b) of the Randolph-Sheppard Blind Vending Act (Act), 20 U.S.C. §§ 107-107f, has the authority to order a federal agency or department found in violation of the Act to take specific remedial action. Appellant, the Maryland State Department of Education, Division of Rehabilitation Services, asserts that the district court erred when it held that the arbitration panel convened in this case exceeded its authority when it ordered appellees, the United States Department of Veterans Affairs

(DVA) and individuals associated with the DVA,[1] to undertake specific remedial action. Finding no error, we affirm.

I.

Because this appeal involves the interpretation of a statute, it is helpful to begin our discussion with an overview of the Act and the statutory provisions at issue in this case.

A.

Congress enacted the Act to "provid[e] blind persons with remunerative employment, enlarg[e] the economic opportunities of the blind, and stimulat[e] the blind to greater efforts in striving to make themselves self-supporting." 20 U.S.C. § 107(a). The Act requires that all new buildings constructed by any federal department or agency contain within them a "satisfactory site . . . for the location and operation of a vending facility by a blind person." *Id.* § 107a(d)(1)(B). The Act provides that the Secretary of the United States Department of Education (Secretary) shall administer the Act and designate a state licensing agency, which will be responsible for implementing the provisions of the Act in each state. *Id.* § 107a(a). The responsibilities of the state licensing agency under the Act include issuing licenses to blind persons for operating vending facilities and administering the blind

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[1]In addition to the United States Department of Veterans Affairs, Maryland brought this action against Jesse Brown, Secretary of the DVA; John T. Farrar, Undersecretary of the DVA; and Michael B. Phaup, Director of the Veterans Affairs Medical Center in Baltimore, Maryland.

addition, the Act grants the state licensing agency the authority to select a location for a blind vending facility within federal buildings and to determine the type of vending facility to be maintained, though this authority is subject to the approval of the head of the department or agency in control of the building. *Id.* § 107a(c).

In addition to its substantive provisions, the Act provides a procedural mechanism for resolving disputes that arise out of the administration of the Act. Section 107d-1(a), for example, provides for a full evidentiary hearing before the state licensing agency for any blind licensee who is "dissatisfied with any action arising from the operation or administration of the vending facility program." 20 U.S.C. § 107d-1(a). A blind licensee who is dissatisfied with the agency's decision following such a hearing may file a complaint with the Secretary who shall convene an arbitration panel to settle the dispute. *Id.*

Section 107d-1(b) provides a parallel provision for a state licensing agency that is dissatisfied with the efforts of a federal entity to comply with the provisions of the Act. Under § 107d-1(b), a state licensing agency that believes a federal entity is failing to comply with the Act may file a complaint with the Secretary and the Secretary shall convene a panel to arbitrate the dispute pursuant to § 107d-2. *Id.* § 107d-1(b). Section 107d-2(b)(2) discusses the composition of an arbitration panel convened under § 107d-1(b) and provides that if the panel finds that the acts or practices of the federal entity are in violation of the Act, the head of the federal entity "shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel." *Id.* § 107d-2(b)(2). According to the Act, the decision of the panel shall be "final and binding" on the

parties. *Id.*

B.

The parties' dispute arose in 1987, when the DVA began construction of the Veterans Affairs Medical Center (VAMC) in Baltimore, Maryland without providing notice to the Maryland State Department of Education, Division of Rehabilitation Services (Maryland), the state licensing agency, as required by § 107a(d)(1) of the Act. *See* 20 U.S.C. § 107a(d)(1). Upon learning of the VAMC project, Maryland applied to the DVA for a permit to operate a blind vending facility at the VAMC. The DVA denied Maryland's application, and an arbitration panel, convened pursuant to § 107d-1(b) of the Act, held a hearing to arbitrate the dispute.

On May 5, 1994, the arbitration panel issued a unanimous order finding that the provisions of the Act applied to the VAMC and ordering that the parties enter into negotiations to permit Maryland and its licensed vendor to operate a vending facility at the VAMC. The panel's order provided further that if the parties failed to agree on a permit for the vending facility by June 1, 1994, each party should submit a proposed permit before June 15, 1994, and the permit preferred by a majority of the panel would become the final award of the panel.

On June 15, 1994, Maryland submitted a proposed permit to the panel. Although the DVA did not submit a proposed permit, it filed a motion seeking reconsideration of the panel's decision.

On October 15, 1994, the arbitration panel issued its final order in which it directed the DVA to turn over to

Maryland the operation of the retail store already located at the VAMC, then operated by the DVA in accordance with the Veterans' Canteen Service Act, 38 U.S.C. §§ 7801-7810.[2] In addition to the retail store space, the arbitration panel also ordered that the DVA turn over certain fixtures and equipment.

Maryland filed this action in the United States District Court for the District of Maryland in response to the DVA's continued refusal to comply with the arbitration panel's award. In its Amended Complaint, Maryland sought an order from the district court requiring the DVA to comply with the arbitration panel's award or, alternatively, an order requiring the DVA to comply with the Act by providing a satisfactory site for a blind vendor's facility at the VAMC. On May 31, 1995, the DVA issued a final order with respect to its responsibilities under the Act and offered three specific sites within the VAMC which the DVA deemed satisfactory under the Act for the operation of a blind vending facility. Maryland rejected each of these sites as unsatisfactory. Both parties moved for summary judgment, and on August 17, 1995, the district court entered judgment for the DVA. *Maryland State Dep't of Educ. v.*

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[2]The Veterans' Canteen Service Act (VCS), 38 U.S.C. §§ 7801-7810, was created for the purpose of making essential merchandise and services available to veterans hospitalized or domiciled at DVA hospitals at reasonable prices. 38 U.S.C. § 7801. Pursuant to the VCS, retail stores and canteens are operated by the DVA at its hospitals where deemed "necessary and practicable." *Id.* § 7802(1). The DVA initially argued before the district court that the arbitration panel's decision in this case was not enforceable because the Randolph-Sheppard Act did not apply to DVA facilities as contrary to the VCS. The DVA has since abandoned this argument, however, and now concedes that the terms of the Act are applicable to DVA facilities.

United States Dep't of Veterans Affairs, 896 F.Supp. 513 (D. Md. 1995). The district court held that the arbitration panel had exceeded its authority under the Act when it ordered a specific remedy and denied Maryland's request for relief. Maryland noted a timely appeal.

II.

On appeal, Maryland argues that the district court erred when it declined to enforce the arbitration panel's award and entered judgment for the DVA, holding that § 107d-2(b)(2) of the Act does not authorize an arbitration panel, convened under § 107d-1(b) of the Act, to award a specific remedy once a violation of the Act has been found. We disagree and affirm the judgment of the district court in favor of the DVA.

A.

Whether a party is entitled to summary judgment is a matter of law which we review *de novo*. *Higgins v. E.I. DuPont de Nemours and Company*, 863 F.2d 1162, 1167 (4th Cir. 1988). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

B.

Courts are charged with the duty to apply the law that Congress enacted. Therefore, we begin with the language of the statute itself, "bearing in mind that we should give effect to the legislative will as expressed in the

language." *United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 954 (1995). Thus, "[c]ourts are not free to read into the language what is not there, but rather should apply the statute as written." *Id.* In other words, if the statutory language "'is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.'" *Id.* (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

There are, however, rare and narrow exceptions under which courts may stray beyond the plain language of unambiguous statutes. *Id.* One such exception arises if the literal application of statutory language would lead to an absurd result. *See Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930). For this exception to apply, however, the absurdity "must be so gross as to shock the general moral or common sense. And, there must be something to make plain [Congress' intent] that the letter of the statute is not to prevail." *Id.* (internal citations omitted).

Another circumstance permitting courts to look beyond the plain meaning of unambiguous statutory language arises if literal application of the statutory language would produce a result demonstrably at odds with the intent of Congress; in such cases, the intent of Congress rather than the strict language controls. *See United States v. Ron Pair Enters, Inc.*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters. In such cases, the intention of the drafters, rather than the strict language controls.") (internal quotation marks and citations omitted). To come within the ambit of this exception, however, the contrary intent must

have been clearly expressed by the legislative body. *See Russello v. United States*, 464 U.S. 16, 20 (1983). In the absence of expressed Congressional intent, we must assume that Congress intended to convey the language's ordinary meaning. *See United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 506 (2d Cir. 1991) ("The words of a statute should be given their normal meaning and effect in absence of showing that some other meaning was intended."); *United States v. Stokley*, 881 F.2d 114, 116 (4th Cir. 1989) ("In the absence of a contrary indication, the court must assume the drafters of a statute intended to convey the ordinary meaning attached to the language.").

C.

Applying these rules of statutory construction to the language of § 107d-2(b)(2), we hold that the plain language of § 107d-2(b)(2) limits the authority of an arbitration panel convened under § 107d-1(b) to a determination of whether the acts of the federal entity "are in violation" of the substantive provisions of the Act. *See* 20 U.S.C. § 107d-2(b)(2). Section 107d-2(b)(2) provides, in pertinent part:

> If the panel appointed pursuant to paragraph (2) finds that the acts or practices of any such department, agency or instrumentality are in violation of this chapter, or any regulation issued thereunder, *the head of any such department, agency, or instrumentality shall cause such acts or practices to be terminated promptly* and shall take such other action as may be necessary to carry out the decision of the panel.

Id. (emphasis added). The plain language of this provision provides that a § 107d-1(b) arbitration panel will determine

whether the federal entity is in violation of the Act, while the head of the federal entity will remedy the violation. Thus, the statute places the responsibility for ending the violation on the head of the federal entity and does not authorize a § 107d-1(b) arbitration panel to order the federal entity to take specific remedial action. Since the language of the statute is "facially clear and 'within the constitutional authority of [Congress], the sole function of th[is] court[ ] is to enforce it according to its terms.'" *See Murphy*, 35 F.3d at 145 (quoting *Caminetti*, 242 U.S. at 485).

While the question of the scope of an arbitration panel's authority under § 107d-1(b) is one of first impression in this circuit, in *Georgia Dep't of Human Resources v. Nash*, 915 F.2d 1482 (11th Cir. 1990), the Eleventh Circuit discussed the authority of a § 107d-1(b) arbitration panel as set forth in § 107d-2(b)(2). *Id.* at 1491-92. The precise question before the Eleventh Circuit in *Nash* was whether the district court properly interpreted the Act to grant a blind licensee a cause of action for damages against the state licensing agency for the agency's failure to file a complaint against a federal entity under § 107d-1(b). *Id.* at 1483. In holding that the Act does not authorize such a cause of action, the Eleventh Circuit discussed extensively the remedial provisions of the Act and the powers granted thereunder. *See id.* at 1487-95.

In particular, the court examined the differences between the remedial procedures provided under § 107d-1(a) for complaints filed by blind licensees against the state licensing agency and those provided under § 107d-1(b) for complaints filed by the state licensing agency against a federal entity. The court noted differences in the composition of the arbitration panels convened under § 107d-1(a) and § 107d-1(b) and in the remedial powers

granted to those panels. With regard to the powers of an arbitration panel convened under § 107d-1(b), the Eleventh Circuit considered the plain language of § 107d-2(b)(2) and concluded that a panel convened to resolve a dispute between a state licensing agency and a federal entity does not have the authority to order a specific remedy, but rather is limited to a determination of whether the federal entity is in compliance with the terms of the Act:

> [Section 107d-2(b)(2)] specifically grants the arbitration panel in subsection (b) cases authority to decide whether the federal entity's acts "are in violation" of the Act. The provision, however, limits the panel's authority to that decision alone: although the panel may determine that a violation is occurring and may identify the discrete acts that are in violation, the statute does not authorize the arbitration panel to order the federal entity to take any remedial action. Rather, the statute expressly places the obligation of ending the violation on the federal entity itself.

Id. at 1492. The Eleventh Circuit contrasted the language placing express limits on a § 107d-1(b) arbitration panel with the absence of such language limiting the authority of a § 107d-1(b) arbitration panel.

As support for its assertion that the plain language of § 107d-2(b)(2) does not limited the remedial powers of a § 107d-1(b) arbitration panel, Maryland relies on *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90 (D.C. Cir. 1986). In *Weinberger*, the court quoted from § 107d-2(b)(2) and concluded that "the Secretary of Education has broad remedial powers under the Act." *Id.* at 109. The District of Columbia Circuit, however, did not discuss how it reached its conclusion that the Secretary's

remedial powers under § 107d-2(b)(2) were broad. *See id.* Nor did the court discuss the effect of the "head of any such department" clause, which vests responsibility for "caus[ing] [violative] acts or practices to be terminated promptly" in that individual. *See id.; see also* 20 U.S.C. § 107d-2(b)(2). We believe that our interpretation of § 107d-2(b)(2) gives effect to all of the language of the provision and, therefore, decline to follow the District of Columbia Circuit's interpretation of § 107d-2(b)(2).

Maryland also argues our interpretation cannot be correct because under such an interpretation, a federal entity can simply refuse to remedy the violations found by a § 107d-1(b) panel. As recognized above, the court may look beyond the plain language of the statute, if the literal application of statutory language would lead to an absurd result. *See Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930). However, the absurdity "must be so gross as to shock the general moral or common sense." *Id.*

In this case, the result of our interpretation of § 107d-2(b)(2) is that the DVA is vested with the responsibility to end the acts found in violation of the Act and to take other steps necessary to bring it into compliance. While it may have been wiser for Congress to have provided for an automatic review of the remedial steps taken by a federal entity in response to an arbitration decision, the fact that Maryland is left without such a review is not "so gross as to shock the general moral or common sense." *See id.* In addition, if a state licensing agency is dissatisfied with the response of a federal entity to an arbitration panel's decision, the state agency can file another complaint with the Secretary and have a second arbitration panel determine whether the federal entity's acts in response to the first decision bring it into compliance

with the Act. Again, this solution may seem cumbersome, but it is not "so gross as to shock the general moral or common sense." *See id.* Therefore, we must adhere to the result dictated by the plain language of the statute.

Finally, Maryland argues that to hold that a § 107d-1(b) arbitration panel does not have the authority to order specific relief contravenes the intent of Congress. In particular, Maryland cites legislative history suggesting that at the time Congress enacted the 1974 Amendments to the Act, which included § 107d, it was concerned with abuses of the program by federal agencies. S. Rep. No. 937, 93d Cong., 2d Sess. 10-11 (1974). As Maryland notes, the legislative history indicates that Congress enacted the remedial provisions of the Act to "provide the means by which aggrieved vendors and State agencies may obtain a final and satisfactory resolution of disputes." *Id.* at 20.

This legislative history does not, however, cast a shadow on our holding or the Eleventh Circuit's interpretation of § 107d-2(b)(2) in *Nash*. While the Senate Report indicates that Congress intended to provide a final resolution of disputes arising from the administration of the Act, it does not clearly express Congress' intent that the resolution of every facet of these disputes -- that is, both the fact of a violation and the appropriate remedy -- should lie with the arbitration panel. As indicated above, we read the plain language of the statute to require that the arbitration panel resolve the dispute as to whether the federal entity in question is in violation of the statute, while the responsibility for correcting the violation lies with the federal entity head. Nothing in the legislative history cited by Maryland suggests that this interpretation will produce a result "demonstrably at odds with the intentions of [the Act's] drafters." *See Ron Pair Enters., Inc.*, 489 U.S. at

242. Therefore, we adhere to the result dictated by the plain language of the statute.

III.

In summary, the arbitrator panel not only determined that the DVA's actions were in violation of the Act, but also ordered the DVA to turn over to Maryland specific space in the VAMC, as well as certain fixtures and equipment. We agree with the district court that by ordering a specific remedy to the violation it found, the arbitration panel exceeded its authority under § 107d-2(b)(2). Therefore, we affirm the district court's grant of summary judgment in favor of the DVA.[3]

AFFIRMED

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[3] Because we are affirming the judgment of the district court on the basis that the arbitration panel exceeded its authority under § 107d-2(b)(2), we need not address the DVA's alternative argument that enforcement of the panel's award would usurp the DVA's statutory authority under the VCS.

FILED: December 31, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2626
(CA-95-8-K)

MARYLAND STATE DEPARTMENT OF EDUCATION, Division of Rehabilitation Services,

Plaintiff - Appellant,

NATIONAL FEDERATION OF THE BLIND,

Amicus Curiae - Intervenor,

DONALD J. MORRIS,

Intervenor,

versus

U.S. DEPARTMENT OF VETERANS AFFAIRS; JESSE BROWN, Secretary, Department of Veterans Affairs; JOHN T. FARRAR, Under Secretary for Health, Department of Veterans Affairs; MICHAEL B. PHAUP, Director, Veterans Affairs Medical Center.

Defendants - Appellees.

ORDER

Amicus curiae, National Federation of the Blind, and Donald J. Morris have filed a motion to intervene for the purposes of filing a petition for rehearing with suggestion

for rehearing in banc. Appellant has also filed a petition for rehearing with a suggestion for rehearing in banc.

The Court grants the motion of the National Federation of the Blind and Donald J. Morris for leave to intervene. Appellant's and Intervenors' petitions for rehearing with suggestions for rehearing in banc were submitted to the Court. As no member of this Court or the panel requested a poll on the suggestions for rehearing in banc, and

As the panel considered the petitions for rehearing, it is of the opinion that they should be denied.

IT IS ORDERED that appellant's and intervenors' petitions for rehearing with suggestions for rehearings in banc are denied.

For the Court

/s/ Patricia S. Connor

Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF REHABILITATION SERVICES	*	
v.	*	CIVIL NO. K-95-8
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, ET. AL.	*	

Filed: August 17, 1995

J. Joseph Curran, Jr., Esquire, Attorney General of Maryland, Caroline E. Emerson, Esquire, Assistant Attorney General of Maryland, Carmen M. Shepard, Esquire, Assistant Attorney General of Maryland, and Evelyn O. Cannon, Esquire, Assistant Attorney General of Maryland for plaintiff.

Lynn A. Battaglia, Esquire, United States Attorney, and Allen F. Loucks, Esquire, Assistant United States Attorney for the District of Maryland; Sheila Lieber, Esquire and Elise S. Shore, Esquire, United States Department of Justice, Civil Division, Federal Programs Branch; Frank Hunger, Esquire, United States Department of Justice; and Gregory Burke, Office of the General Counsel, United States Department of Veterans Affairs, for defendants.

KAUFMAN, Senior District Judge

This case involves two federal statutes, the Randolph-Sheppard Act, 20 U.S.C. § 107-107f, and the Veterans'

Canteen Service Act, 38 U.S.C. § 7801, et. seq., each of which provides different benefits for different purposes. Plaintiff, Maryland State Department of Education, Division of Rehabilitation Services ("State")[1], initiated this suit under the Randolph-Sheppard Act against defendants, United States Department of Veterans Affairs ("DVA"), Jesse Brown, Secretary of the United States Department of Veterans Affairs ("Secretary"), John T. Farrar, Under-Secretary of the United States Department of Veterans Affairs, and Michael B. Phaup, Director of the Veterans Affairs Medical Center in Baltimore Maryland. Each of the defendants is either a federal government entity or an officer of such entity. Jurisdiction exists pursuant to 28 U.S.C. § § 1331 and 1361.

The Randolph-Sheppard Act ("R-S Act") establishes a cooperative federal/state vocational rehabilitation program to promote economic opportunity and self-sufficiency for blind individuals through the operation of vending facilities on federal property. Under the Act, every building acquired, constructed, substantially altered or renovated by a federal agency after January 1, 1975 must include a satisfactory site for a blind vending facility. In 1987, the DVA began construction of the Veterans Affairs Medical Center ("VAMC") located at 10 North Greene Street, Baltimore, Maryland. DORS, the State licensing agency, charged with implementing the R-S Act in Maryland, was not given notice by the DVA of DVA's plan to construct the VAMC. DORS, after learning of the VAMC project, applied on December 2, 1991, to the DVA for a permit to operate a Randolph-Sheppard vending facility at the VAMC; the DVA denied that request on April 6, 1992. Under the R-S Act, if the state licensing agency (SLA)

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[1] The Division itself is referred to herein as "DORS."

believes that a federal agency is in violation of the Act, the SLA may file a complaint with the Secretary of Education of the United States to convene a panel to arbitrate the dispute. The decision of that panel is binding on the parties.[2]

DORS filed a complaint with the Secretary of Education on June 24, 1992 and requested that the dispute with the DVA be arbitrated. An arbitration panel held a hearing on July 19, 1993 and both parties presented evidence. The parties also submitted post-hearing briefs. Defendants argued that the separate duties, imposed on the DVA by the Veterans' Canteen Service Act ("VCS"), exempted the defendants from the requirement of the R-S Act. Furthermore, defendants argued that no space was available at the VAMC to provide a blind vending facility. Plaintiffs contended that the R-S Act was applicable to the DVA and must be enforced. On May 5, 1994, the arbitration panel issued a unanimous opinion that the R-S Act applied to the VAMC and that the VCS did not exempt the VAMC from the R-S Act's requirements. The panel ordered the parties to enter into negotiations to devise a solution to allow DORS and its licensed vendor to operate a vending facility at the VAMC. The arbitration panel's Order also provided, at page 8 of the May 5, 1994 opinion, that "[i]f no permit is agreed upon by June 1, 1994, then each party shall submit a proposed permit to this panel on or before June 15, 1994, and the proposed permit preferred by a majority of the arbitration panel shall become the final award of the panel." Despite the Order of the arbitration panel, the DVA did not

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[2] See 20 U.S.C. §107d-1(b).

enter into negotiations with DORS.[3] DORS submitted to the panel on June 15, 1994, a proposed permit; the DVA did not submit a proposed permit. On October 15, 1994, the arbitration panel issued a final Order which required the DVA to "turn over the operation of the retail store at VAMC Baltimore . . . effective January 1, 1995."[4] That retail store, specifically referred to in the arbitration panel's Order, is a store currently operated under the provisions of the VCS. The October 15, 1994 Order of the panel also included a requirement that the DVA turn over certain fixtures and equipment in addition to the retail store space. As of the date of the filing of the within opinion, the DVA has not complied with the arbitration panel's Order.

Plaintiff brought this action seeking, as its primary form of relief, an Order from this Court requiring the DVA to comply with the arbitration panel's award, namely that the retail store at the VAMC and the fixtures within the store be turned over to the State for the operation of a blind vendor space. In its initial complaint, the State sought its remedy via motions for a preliminary injunction and summary judgment. At the suggestion of this Court, the State amended its complaint, seeking on a secondary basis, as an alternative to such primary relief, i.e. the enforcement of the arbitration award, a secondary form of relief, i.e. that this

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[3] In its answer, defendants note that while they did not enter into negotiations, they did file a motion asking the arbitration panel to reconsider its decision. See Defendants' answer to first amended complaint at ¶ 22. The panel has not altered its Order.

[4] See Plaintiff's first amended complaint at ¶ 25.

Court require defendants to comply with the R-S Act.[5] In seeking this secondary form of relief, the State set forth, inter alia, specific requirements with regard to size of space and location of space which the State contends are required by the R-S Act.[6] Defendants moved to dismiss, or in the alternative, for summary judgment, arguing that under the R-S Act, only the Secretary has the authority to remedy any violation of the R-S Act.

This Court, beginning in April, 1994, held a series of lengthy on-the-record and off-the-record telephone conferences and in-chambers conferences with counsel on both sides in an effort to resolve the within case in a mutually agreeable manner. In some respects, counsel were able to work together to resolve their differences. While the DVA initially argued that the R-S Act was inapplicable,[7] and argued that the doctrine of laches prevented the plaintiff from bringing the within suit, the DVA dropped those positions, ceased to advocate them, and offered specific space at the VAMC to the plaintiff for a blind vending facility. When the State objected to that proposed space, the DVA offered alternative sites which were later embodied, as alternative spaces, in a final Order of the Secretary, dated June 1, 1995. Also, the State

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[5] See Plaintiff's First Amended Complaint for Declaratory and Injunctive Relief at page 8-9.

[6] As discussed infra, several central questions of fact which remain before this Court relate to the issues of size and location of space -- specifically what is the amount of space at the VAMC, and what is appropriate specific space within the VAMC, needed to comply with the R-S Act.

[7] In this Court's view, it is clear that the R-S Act is applicable.

acknowledged that the arbitration panel exceeded its authority when it Ordered the DVA to turn over certain fixtures and equipment in addition to the retail store space.

However, in the end, settlement discussions were not successful. At the heart of the dispute lie factual disputes with regard to the amount of space and the location of space. In that regard, the State has rejected each and all of the sites proposed by the DVA and later embodied in the Secretary's June 1, 1995 Order. Instead, the State, while primarily seeking enforcement of the arbitration panel's Order, asked, on a secondary basis, that a conference room located on the second floor of the VAMC be designated as the blind vendor facility. The DVA has rejected that proposal.

I

Under § 706 of the Administrative Procedure Act ("APA"), the decision of a federal agency official such as the Secretary is reviewed under an arbitrary and/or capricious standard. However, because the record does not include any factual and/or legal development by the arbitration panel or by the Secretary with regard to the requirements of the R-S Act concerning size and/or location of space, this Court raised the possibility that this Court might hold an evidentiary hearing, under Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) and its progeny in order to receive evidence concerning such matters. Under Overton Park "there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." Id. at 415. Such a hearing was in fact once scheduled to take place in June, 1995. However, the State objected to a such procedure, stating

that this Court should not hold a hearing, but rather, that the arbitration panel should hold the evidentiary hearing.[8] Defendants did not seek or oppose any such hearing. While this Court believes that it possesses discretionary authority to hold a hearing under the standards of Overton Park -- whether or not the State so agrees -- this Court cancelled the hearing because of the State's position. However, this Court, in a Memorandum and Order dated June 19, 1995, provided to the State the opportunity to seek to have the case remanded to the arbitration panel. The State, however, also rejected that option.[9] This Court, in a Memorandum and Order dated July 7, 1995, provided plaintiff with yet another option -- to seek a remand to the Secretary so that the Secretary could make findings of fact and conclusions of law with a review available by this Court under § 706 of the APA after the Secretary so acted. If plaintiff desired such a remand, it was required to so request on or before July 21, 1995. Plaintiff has not so requested.

In the amended complaint, the State specifically requests that the space to be designated "consist of at least 700 square feet, including space for storage" and that the space "be directly accessible from a corridor used for pedestrian traffic so as to provide access by potential customers." First Amended Complaint at pages 8-9. It is undisputed that the spaces embodied in the Secretary's June 1, 1995 Order consist of less than 700 square feet. Additionally, it is also undisputed that the larger of the spaces offered to the State at the VAMC is not on a pedestrian corridor. What is disputed, however, and thus, what this Court cannot decide

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[8] See Plaintiff's supplemental brief dated May 31, 1995.

[9] See Plaintiff's Response to Court's June 19 Memorandum and Order dated June 28, 1995.

in the light of the current record, is whether the amount of space for a blind vendor facility should, in order to meet the requirements of the R-S Act and of applicable regulations under that statute, consist of at least 700 square fee and/or whether any such facility must be located on a main pedestrian corridor.

In challenging the Secretary's June 1, 1995 Order, the State poses various issues of relevant and material disputed fact. For example, the State refers to the DVA's contention that it cannot relocate the conference room without harming the medical and educational missions of the VAMC.[10] Additionally, the State states that its decision to reject the proposed sites was "predominantly" due to size and/or location of space.[11] In that regard, the State contends that because one of the areas of space, designated by the Secretary's June 1, 1995 Order, encompasses only 570 square feet and is located adjacent to the cafeteria, the designation of such space by the Secretary is not in compliance with the R-S Act. The State also argues that "square footage alone does not determine whether a proposed blind vending facility will be viable . . . Additional critical factors . . . includ[ing] location, . . . visibility, . . . overall size and layout of the facilities . . . [effect the viability of a facility]."[12] Further, the State asserts that, in other instances, there have been agreements between blind vendors and other vendors voluntarily to limit product lines to minimize head-to-head competition.

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[10] See Affidavit of Scott Dennis, Director of the Maryland Blind Vending Program at ¶ 8.

[11] Id. at ¶ ¶ 5-6.

[12] Id. at ¶ 3.

Because the DVA, in this instance, has refused so to agree, the State argues that the location of space is that much more important.[13] The DVA, however, contends that the R-S Act requires only a minimum amount of space of 250 square feet, see 34 C.F.R. § 395.1(q), and that the R-S Act is silent concerning location of space. Thus, in the view of the DVA, it has met the R-S Act's minimum requirements int he Secretary's alternative designations of space in his June 1, 1995 Order.

The Secretary's said Order simply describes the amount of space and location of space. It does not address any of the various items of factual and/or legal dispute discussed supra. In that context, this Court offered options to the parties so as to permit the development of an amplified factual record which would permit this Court, as the present record does not, to determine whether the Secretary has, in his June 1, 1995 Order, acted arbitrarily, or otherwise than in accordance with the R-S Act.

II

When this Court first conferred with counsel in April, 1995, as well as at numerous other times thereafter, this Court consistently expressed the view that the State would likely, in this Court's view, not succeed in connection with its primary quest to have this Court enforce the arbitration panel's award. Therefore, this Court encouraged plaintiff to seek alternative relief.[14]

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[13] Id. at ¶ 7.

[14] In its May 19, 1995 filing, the State moved for this Court to certify this case for immediate interlocutory appeal to the Fourth Circuit from this Court's expected decision with

The R-S Act provides that it is the duty of the agency head to remedy any violation of the Act.

> If the panel appointed pursuant to paragraph (2) finds that the acts or practices of any such department, agency, or instrumentality are in violation of this chapter, or any regulation issued thereunder, the head of any such department, agency, or instrumentality shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.

20 U.S.C. § 107d-2(b)(2). The statute also provides that the arbitration panel will review the agency action and determine if that action violates the Act. However, under the statute, it is the role of the agency head, in this case the Secretary of Veterans Affairs, to remedy any violation of the Act.

It is in that context that this Court finds itself in agreement with Chief Judge Tjoflat's view that "[t]he subsection (b) panel . . . under the Act's express terms, has no remedial powers whatsoever. It may determine that certain of the federal entity's acts violate the Act, but the Act leaves responsibility for remedying the violation to the federal entity itself." Georgia Dep't of Human Resources v. Nash, 915 F.2d 1482, 1492 (11th Cir. 1990). See also United States v. Mississippi Vocational Rehabilitation for

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regard to the denial of the primary relief sought. This Court rejected that said request, and instead encouraged the State to seek alternative relief by one of the procedures discussed supra with an eye to achieving prompt designation of appropriate space at the VAMC for use by the blind vendors. The State, however, has decided not to avail itself of any of those options.

the Blind, 794 F.Supp. 1344, 1352 (S.D. Miss. 1992). In the within case, it is undisputed that the arbitration panel, in issuing its final decision, did fashion a specific remedy. Therefore, under Nash, the arbitration panel exceeded its authority.

The State argues that the R-S Act creates a priority over the Veterans' Canteen Service Act and that, on that basis, the arbitration panel's award should be enforced. In essence, the State seems to contend that Congress created two statutes designed to aid two distinct groups of people and that the R-S Act trumps the Veterans' legislation. As this Court concludes that the arbitration panel exceeded its authority in designating the remedy, this Court need not reach the question of whether one statute has priority, in whole or in part, over the other. The State, as is its right, has repeatedly disagreed with and objected to this Court's reliance on Nash, arguing that the R-S Act allows the arbitration panel to remedy the agency's violation. Plaintiff's view in that regard is once again rejected by this Court. There remains before this Court the question of whether this Court should grant plaintiff's secondary quest for relief, namely that this Court exercise its equity powers and order the Secretary to comply with the R-S Act and determine whether the Secretary's June 1, 1995 Order designating certain alternative spaces violates the R-S Act or any rules and/or regulations thereunder.

The State has pointed out in one or more filings that the State is not seeking, in connection with its secondary quest for relief from this Court, any review under the APA. The State has also stated, as this Court noted in paragraph (6) of its July 7, 1995 Memorandum and Order in this case, that the Secretary apparently cannot seek review of his own decision under the APA. Were this Court required to reach

the APA issue, which -- as discussed infra, it will not -- this Court would find that the State has not established (a) that the Secretary has acted in an "arbitrary or capricious" manner or (b) that the Secretary's June 1, 1995 Order otherwise violates § 706 of the APA.

In that regard, the question arises as to whether, with an avenue of relief seemingly available to the State under the APA, this Court should exercise any of its equity powers. In this instance, this Court need not reach that question, nor whether this Court should presently act in a review capacity under the APA, because whether this Court proceeds under the APA or under its equity powers, this court runs into the same problems, namely that there exist relevant and material issues of disputed fact concerning whether the Secretary's June 1, 1995 Order lacks a "rational basis" or that the Secretary's actions in issuing that Order were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under the standards of the APA, it is the plaintiff's burden, under § 706, to show that agency action is not valid. When applying the arbitrary and capricious standard, this Court must consider whether the Secretary has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'" Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)). This Court seemingly should apply the same standards if it were to act

under its equity powers to require the Secretary to comply with the R-S Act.[15]

The existing record now before this Court discloses the DVA's offers of space during settlement discussions which were later embodied in the Secretary's June 1, 1995 Order. A review of that record does not disclose that the Secretary of the DVA failed to "conduct . . . a reasoned evaluation of the relevant information" or that the Secretary has "reached a decision that, although perhaps disputable, was . . . 'arbitrary or capricious.'" Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 385 (1989). It may be, however, that the Secretary did, as the State contends, violate certain requirements of the R-S Act in entering its June 1, 1995 Order as, for example, in the selection of specific alternative locations and/or the size and/or location of the same. But, as of this date, in the context of the present record, the State has not so shown. Thus the State is not entitled to have this Court exercise its equity power to order the Secretary to do anything the Secretary has not done to date.

III

If the judgment entered in this case becomes final, the State will have available to it the options set forth in the Secretary's June 1, 1995 Order, but will have lost the opportunity to have this Court determine whether or not the

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[15] That is so because the only basis for this Court to take action to require the Secretary to act otherwise than in accordance with his June 1, 1995, Order, would be that the Secretary has acted arbitrarily, capriciously or unlawfully. That is the same standard pursuant to which the Secretary's said Order could be successfully challenged by the State pursuant to § 706.

Secretary acted arbitrarily, capriciously or unlawfully in issuing that Order. On its face, in this Court's view, that Order is entirely valid. The burden is on the State to show that the Secretary's Order is arbitrary, capricious, or unlawful. That the State cannot achieve under the existing record, and has declined to opportunity to have this Court, or the Secretary, or the arbitration panel conduct further proceedings in which further findings of fact and determinations of law could be forthcoming. That, in this Court's view, is regrettable, but it accords with the actions of the State in the proceedings in this case before this Court.

IV

For the reasons stated in the within opinion, plaintiff's quest for its primary form of relief, namely that this Court enforce the arbitration panel's order, will be denied in an Order of even date herewith, and plaintiff's quest that this Court, on a secondary basis, exercise its equity powers and direct the Secretary to comply with the R-S Act as specified by the State in the first amended complaint, will also be so denied. Accordingly, in that said Order, judgment will be entered for defendants.

/s/

Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF REHABILITATION SERVICES	*	
v.	*	CIVIL NO. K-95-8
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, ET. AL.	*	

ORDER

(1) All relief sought by plaintiff in this case is hereby denied and judgment is hereby entered for defendants.

(2) It is so ordered, this 17th day of August, 1995.

/s/

Senior United States District Judge

BEFORE THE
UNITED STATES DEPARTMENT OF EDUCATION

In the Matter of Arbitration Between	:	
MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF VOCATIONAL REHABILITATION,	:	
Petitioner,	:	Case No. R-S/92-11
and	:	
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,	:	
Respondent.	:	

* * * * * * * * * * *

OPINION OF THE ARBITRATION PANEL

Issue

This case involves the interplay of two statutes: the Randolph-Sheppard Act, 20 U.S.C. § 107 et seq., and the law governing the operation of Veterans Affairs Medical Centers, specifically 38 U.S. C. § 8110(c). It presents the question of whether Section 8110(c) preempts the Randolph-Sheppard Act's mandate that blind vendors be given a priority to operate vending facilities in federal buildings.

Background

In August 1987, the Department of Veterans Affairs ("VA") began construction of a new Veterans Affairs Medical Center ("VAMC") at 10 N. Greene Street, Baltimore, Maryland. Space allocation in the building was completed in 1985, and final design was completed in 1989. The building's construction was completed in July 1992, and the VA occupied the building in January 1993.

Prior to 1993, the VA operated a VA medical center at 3900 Loch Raven Boulevard in Baltimore. The new facility is two-and-a-half times larger than the old facility. The new facility has a substantially larger staff and treats substantially more patients than the old facility. It has a retail store that is almost twice the size of the retail store at the old facility (slightly under 1,000 square feet versus approximately 500 square feet), in order to accommodate the larger demand at the new facility. This retail store, together with a cafeteria and vending machines at the medical center, are operated by the Veterans' Canteen Service ("VCS"). The VCS hired approximately 13 new employees for the new facility.

The Maryland State Department of Education, Division of Rehabilitation Services ("DVR"), is the State licensing agency ("SLA") designated to administer the Randolph-Sheppard vending program in Maryland.

By letter of December 2, 1991, DVR applied to the VA for a permit to operate a Randolph-Sheppard vending facility at the VAMC Baltimore. Following two additional inquiries from DVR, the VA responded by letter of April 6, 1992, denying the request for a permit.

On June 24, 1992, DVR filed a Complaint with the Secretary of Education requesting arbitration and an award of a vending facility permit pursuant to the Randolph-Sheppard Act.

On July 19, 1993, this panel held a full-day hearing at which both parties presented evidence. Both parties subsequently submitted post-hearing briefs, and the case is now ripe for decision.

Discussion

Congress enacted, and subsequently strengthened, the Randolph-Sheppard Act in order to promote employment opportunities for the blind by providing blind vendors with a priority to operate vending facilities at any federal properties. 20 U.S.C. § 107(a).

The Randolph-Sheppard Act's plain language provides that it applies to any and all federal departments, agencies, and instrumentalities in control of any federal property, 20 U.S.C. §§ 107(a), 107(b)(2), 107e(3); Minnesota v. Riley, 1994 U.S. App. Lexis 4339, at *5 (8th Cir. Mar. 11, 1994), and (with certain exceptions not applicable here) it specifically requires that, after January 1975, no such federal body shall occupy any building that lacks a satisfactory site for a vending facility. 20 U.S.C. § 107a(d).

The Randolph-Sheppard Act and its implementing regulations establish a system under which the Secretary of Education promulgates and administers uniform procedures for the establishment of Randolph-Sheppard vending facilities. 20 U.S.C. § 107(b). It contains an "escape clause" allowing limitations on the placement of vending

facilities, but only if the Secretary of Education specifically finds that the absence of such limitation would adversely affect the interests of the United States. 20 U.S.C. § 107(b). The VA has not applied for an exemption from any of the requirements of the Randolph-Sheppard Act.

The VA's defense to its refusal to issue a permit under the Randolph-Sheppard Act is based primarily on 38 U.S.C. § 8110(c) ("Section 8110(c)"). That statute provides in pertinent part:

> (1) Notwithstanding any other provision of law but except as provided in paragraph (3) of this subsection --
>
> (A) a contract may not be entered into as a result of which an activity at a health-care facility over which the Secretary has direct jurisdiction (hereinafter in this subsection referred to as a "Department health-care facility") would be converted from an activity performed by Federal employees to an activity performed by employees of a contractor of the Government unless the Under Secretary for Health has determined that such activity is not a direct patient care activity or an activity incident to direct patient care . . . .

The VA contends that Section 8110(c) gives it the exclusive right to determine whether an activity at a VA medical facility will be performed, in whole or in part, by federal or non-federal personnel. This argument fails for several separate reasons. First, as the Eight Circuit recently held, "Congress's intent to apply the Randolph Sheppard Act to the VCS is clear from the plain language of the Act . . . . Contrary to the VCS's claim, it is entirely possible for the Randolph Sheppard Act and the Veteran's

Canteen Act to co-exist in harmony." Minnesota v. Riley at *7-8. Second, Section 8110(c) was intended to limit contracting-out of services directly related to patient care, not to preclude the issuance of permits for Randolph-Sheppard vending facilities. Finally, because VAMC Baltimore is a new facility, substantially larger than the previous local facility, the VA could have awarded a permit to the SLA that would not have resulted in any activities being "converted from an activity performed by Federal employees . . . ." Each of these reasons will be briefly discussed in turn.

There is no doubt that Congress intended the Randolph-Sheppard Act to apply to VA Medical Centers. As noted above, the statute specifically refers to property owned or occupied by any "federal department, agency, or instrumentality." Moreover, Congress specifically considered the special requirements of the VCS and decided to exempt it from only one aspect of the Act's operation, regarding the sharing of vending machine income. 20 U.S.C. § 107d-3(d). As the United States District Court for Minnesota observed,

> . . . Congress considered the VCS's need for vending machine revenues, balanced that need with the purposes of the blind vending program, and struck a compromise. The fact that the Congress specifically addressed VCS's needs in amending the Randolph-Sheppard Act indicates a congressional intent to subject the VCS to the Randolph-Sheppard Act; thus, to the extent that its provisions conflict with those of the Veteran's Canteen Service Act, the provisions of the Randolph-Sheppard Act must prevail.

Minnesota v. Alexander, No. 4-91-815, slip op. at 29 (D. Minn. Oct. 13, 1992), aff'd sub nom. Minnesota v. Riley, 1994 U.S. App. Lexis 4339 (8th Cir. 1994).

As the Eight Circuit noted, Randolph-Sheppard facilities and the Veterans Canteen Service can co-exist in harmony. The VCS can continue to operate the cafeteria and vending machines at VAMC Baltimore while a blind vendor licensed by the SLA operates the retail store. It may also negotiate many terms of the permit to meet the needs of its medical center patients, 34 C.F.R. § 395.35(c)(3), and, if it believes that more is needed, it may seek further limitations on the permit from the Secretary of Education under 20 U.S.C. § 107(b). Minnesota v. Riley at *9.

Congress does not appear to have intended that Section 8110(c) would affect the Randolph-Sheppard Act in any way. Unlike the Randolph-Sheppard Act Amendments of 1974 (Pub. L. No. 93-516), which specifically considered vending facilities at veterans' hospitals, neither the Veterans' Compensation, Education, and Employment Amendments of 1982 (Pub. L. No. 97-306, which included the section codified as Section 8110(c)) nor its legislative history make any reference to blind vending facilities. It is not at all clear that Section 8110(c)'s references to "direct patient care activity or an activity incident to direct patient care" or to activities being "performed by a contractor of the Government" were intended to apply to retail sales by a blind vendor licensed by an SLA pursuant to a statutorily required permit under the Randolph-Sheppard Act. The legislative history of that section indicates that its purpose was to respond to Office of Management and Budget Circular A-76 regarding contracting-out, not to change the Randolph-Sheppard Act's requirements. Senate Report No. 97-550, 97th Cong., 2d Sess. 20, 99-101 (1982), reprinted

in 1982 U.S.C.C.A.N. 2882-83, 2950-52; Explanatory Statement of Compromise Agreement, reprinted in 1982 U.S.C.C.A.N. 3029-31. In light of the ambiguity in the statutory language, the legislative history's explanation of the purpose of the amendment as having nothing to do with the Randolph-Sheppard Act, and the ability to harmonize the two statutes, it would be inappropriate to read Section 8110(c) as implicitly repealing a portion of the Randolph-Sheppard Act.

Finally, even if Section 8110(c) does generally preclude the conversion of the operation of retail stores from the VCS to Randolph-Sheppard vendors, no such conversion would have occurred if the VA had complied with the Randolph-Sheppard Act and established a Randolph-Sheppard vending facility at the new VAMC Baltimore. The new medical center is far larger than the old, with a far larger population. Even if the old medical center's retail store had been transferred intact, there was ample demand to support an additional store operated by a blind vendor. It is now a moot point, however, because (according to the VA) the medical center's design will not allow a second store.

For all of these reasons, we conclude that the Randolph-Sheppard Act applies to Veterans Affairs Medical Centers and that Section 8110(c) does not exempt VAMC Baltimore from the Randolph-Sheppard Act's requirements.

Minnesota v. Riley is now controlling and sets out the framework for terms and conditions of a permit at a Veterans Affair Medical Center under the Randolph-Sheppard Act. It specifically allows for negotiations between the parties and provides clear and adequate guidelines.

Award

Accordingly, it is the unanimous award of the arbitration panel that the parties hereto shall enter into negotiations leading to a permit that will allow the SLA and its licensed blind vendor or vendors to operate the retail store at VAMC Baltimore. The terms of the permit shall conform to the requirements of 34 C.F.R. § 395.35. The parties shall be guided by the provisions set forth in the final paragraph of Minnesota v. Riley.

If the parties agree upon a permit on or before June 1, 1994, they shall immediately advise the arbitration panel of its terms and conditions, and that permit shall become the final award of the panel. If no permit is agreed upon by June 1, 1994, then each party shall submit a proposed permit to this panel on or before June 15, 1994, and the proposed permit preferred by a majority of the arbitration panel shall become the final award of the panel.

/s/

May 5, 1994

HAROLD D. JONES, JR., Chairperson

/s/

RUSSELL M. PAQUETTE

/s/

ANDREW D. FREEMAN

BEFORE THE
UNITED STATES DEPARTMENT OF EDUCATION

In the Matter of Arbitration :
Between :

MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF VOCATIONAL REHABILITATION, :

Petitioner, : Case No. R-S/92-11

and :

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, :

Respondent. :

* * * * * * * * * * * *

FINAL AWARD

In accordance with the Panel's Opinion and Award of May 5, 1994, it is hereby ORDERED that:

1. Respondent's Motion for Reconsideration is DENIED:

2. The Permit submitted by the Maryland State Department of Education, Division of Vocational Rehabilitation to this Panel on June 8, 1994, shall govern the operations of a Randolph-Sheppard vending facility at the Veterans Affairs Medical Center in Baltimore;

3. On or before October 20, 1994, the United States Department of Veterans Affairs shall provide a description of the space now used for the retail store and associated storage and office space at VAMC Baltimore, to be included as Attachment B to the Permit, and a list of equipment or fixtures now in that space, to be included as Attachment D to the Permit; and

4. The Department of Veterans Affairs shall turn over the operation of the retail store at VAMC Baltimore to the Maryland State Department of Education, Division of Rehabilitation Services effective January 1, 1995, or such other date as the parties may agree upon.

/s/

Date: October 15, 1994

HAROLD D. JONES, JR.,
Chairperson

/s/

Concur:

ANDREW D. FREEMAN

BEFORE THE
UNITED STATES DEPARTMENT OF EDUCATION

In the Matter of Arbitration Between	:	
MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF VOCATIONAL REHABILITATION,	:	
Petitioner,	:	CASE NO. R-S/92-11
and	:	
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,	:	
Respondent.	:	

DISSENTING OPINION

I have fully considered the arguments and briefs submitted by both parties, including the applicable laws and regulations. I would refer specifically to the Motion for Reconsideration filed by the Respondent on June 15, 1994, and the Reply filed by the Petitioner dated June 21, 1994.

The Motion referred to is an in depth analysis of Title 38 United States Code §§ 8110 (C) (1) (A) and 8110 (C) (1) (B). In my opinion, the Sections noted above are applicable and controlling and I adopt and include in this opinion and award all of the arguments set forth in Respondent's Motion of June 15, 1994.

It is my conclusion, therefore, that no permit should be issued to provide the State with vending facilities at the Veterans Affairs Medical Center in Baltimore, Maryland, and space, therefore, is hereby denied.

/s/

RUSSELL M. PAQUETTE

DATED: 8/17/94

Background

The complainant, Maryland State Department of Education, Division of Vocational Rehabilitation, is the State licensing agency (SLA) for the Randolph-Sheppard vending program in Maryland. The respondent, United States Department of Veterans Affairs (VA), began construction of a new Veterans Affairs Medical Center (VAMC) in Baltimore, Maryland, in August 1987 and occupied the building in January 1993. Prior to 1993, the VA operated an older, smaller medical center in Baltimore, that did not contain a Randolph-Sheppard vending facility.

On December 2, 1991, the SLA applied to the VA for a permit to operate a Randolph-Sheppard vending facility at the new VAMC Baltimore. Following two additional inquiries, the VA denied the request on April 6, 1992.

On June 24, 1992, the SLA filed a Complaint with the U.S. Department of Education, requesting arbitration and an award of a vending facility permit at VAMC Baltimore. The arbitration panel was convened and a hearing was held in Baltimore, Maryland, on July 19, 1993.

Arbitration Panel Decision

The arbitration panel ruled that the Randolph-Sheppard Act applies to all federal properties and agencies, including Veterans Affairs Medical Centers, and requires that the VA issue a vending facility permit for the SLA and its licensed blind vendor to operate the retail store at VAMC Baltimore.

The panel held that the plain language of the Randolph-Sheppard Act provides that it applies to all federal departments, agencies, and instrumentalities in control of any federal property, and thus applies to the VA.

The panel rejected the VA's argument that a provision of the law governing Veterans Affairs Medical Centers (Section 8110(c)) exempts those facilities from the Randolph-Sheppard Act. It held that Congress, in amending the Randolph-Sheppard Act in 1974, explicitly considered Veterans Affairs Medical Centers and intended the Act to apply to them. It further held that Section 8110(c) was not intended to preclude the issuance of permits for Randolph-Sheppard vending facilities, and that even if that section did apply to other VA Medical Centers, it did not apply in this case because the new, larger medical center provided an opportunity for a new vending facility without converting from federal to non-federal employees. The panel concluded that the Eighth Circuit's decision in Minnesota v. Riley provided the framework for terms and conditions of a permit at Veterans Affairs Medical Centers.

After the VA failed to submit a proposed permit as requested by the panel, and instead filed a Motion for Reconsideration, a majority of the panel denied the Motion for Reconsideration and ordered that the SLA shall operate the retail store at VAMC Baltimore, pursuant to a permit proposed by the SLA.

The panel member selected by the respondent, after joining in the opinion of the panel, dissented from the denial of the Motion for Reconsideration and from the Final Award. Upon reconsideration, he would have held that Section 8110(c) exempted the VAMC from the Randolph-Sheppard Act.

20 U.S.C. § 107 - 107f

§ 107. Operation of vending facilities

(a) Authorization

For the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting, blind persons licensed under the provisions of this chapter shall be authorized to operate vending facilities on any Federal property.

(b) Preferences regulations; justification for limitation on operation

In authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency as provided in this chapter; and the Secretary, through the Commissioner, shall, after consultation with the Administrator of General Services and other heads of departments, agencies, or instrumentalities of the United States in control of the maintenance, operation, and protection of Federal property, prescribe regulations designed to assure that-

(1) the priority under this subsection is given to such licensed blind persons (including assignment of vending machine income pursuant to section 107d-3 of this title to achieve and protect such priority), and

(2) wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States.

Any limitation on the placement or operation of a vending facility based on a finding that such placement or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine whether such limitation is justified. A determination made by the Secretary pursuant to this provision shall be binding on any department, agency, or instrumentality of the United States affected by such determination. The Secretary shall publish such determination, along with supporting documentation, in the Federal Register.

§ 107a. Federal and State responsibilities

(a) Functions of the Secretary; surveys; designation of State licensing agencies; qualifications for license; evaluation of programs

The Secretary of Education shall-

(1) Insure that the Rehabilitation Services Administration is the principal agency for carrying out this chapter; and the Commissioner shall, within one hundred and eighty days after enactment of the Randolph-Sheppard Act Amendments of 1974, establish requirements for the uniform application of this chapter by each State agency designated under paragraph (5) of this subsection, including appropriate accounting procedures, policies on the selection and establishment of new vending facilities, distribution of income to blind vendors, and the use and control of set-aside funds under section 107b(3) of this title;

(2) Through the Commissioner, make annual surveys of concession vending opportunities for blind persons on Federal and other property in the United States, particularly with respect to Federal property

under the control of the General Services Administration, the Department of Defense, and the United States Postal Service;

(3) Make surveys throughout the United States of industries with a view to obtaining information that will assist blind persons to obtain employment;

(4) Make available to the public, and especially to persons and organizations engaged in work for the blind, information obtained as a result of such surveys;

(5) Designate as provided in section 107b of this title the State agency for the blind in each State, or, in any State in which there is no such agency, some other public agency to issue licenses to blind persons who are citizens of the United States for the operating of vending facilities on Federal and other property in such State for the vending of newspapers, periodicals, confections, tobacco products, foods, beverages, and other articles or services dispensed automatically or manually and prepared on or off the premises in accordance with all applicable health laws, as determined by the State licensing agency, and including the vending or exchange of chances for any lottery authorized by State law and conducted by an agency of a State; and

(6) Through the Commission,[1] (A) conduct periodic evaluations of the program authorized by this chapter, including upward mobility and other training required by section 107d-4 of this title, and annually submit to the appropriate committees of Congress a report based on such evaluations, and (B) take such other steps, including the issuance of such rules and regulations, as may be necessary or desirable in

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[1]So in original. Probably should be "Commissioner".

carrying out the provisions of this chapter.

(b) Duty of State licensing agencies to prefer blind

The State licensing agency shall, in issuing each such license for the operation of a vending facility, give preference to blind persons who are in need of employment. Each such license shall be issued for an indefinite period but may be terminated by the State licensing agency if it is satisfied that the facility is not being operated in accordance with the rules and regulations prescribed by such licensing agency. Such licenses shall be issued only to applicants who are blind within the meaning of section 107e of this title.

(c) Selection of location and type of facility

The State licensing agency designated by the Secretary is authorized, with the approval of the head of the department or agency in control of the maintenance, operation, and protection of the Federal property on which the facility is to be located but subject to regulations prescribed pursuant to section 107 of this title, to select a location for such facility and the type of facility to be provided.

(d) Buildings occupied by United States departments, agencies, and instrumentalities required to provide sites for facilities; exceptions

(1) After January 1, 1975, no department, agency, or instrumentality of the United States shall undertake to acquire by ownership, rent, lease, or to otherwise occupy, in whole or in part, any building unless, after consultation with the head of such department, agency, or instrumentality and the State licensing agency, it is

determined by the Secretary that (A) such building includes a satisfactory site or sites for the location and operation of a vending facility by a blind person, or (B) if a building is to be constructed, substantially altered, or renovated, or in the case of a building that is already occupied on such date by such department, agency, or instrumentality, is to be substantially altered or renovated for use by such department, agency, or instrumentality, the design for such construction, substantial alteration, or renovation includes a satisfactory site or sites for the location and operation of a vending facility by a blind person. Each such department, agency, or instrumentality shall provide notice to the appropriate State licensing agency of its plans for occupation, acquisition, renovation, or relocation of a building adequate to permit such State agency to determine whether such building includes a satisfactory site or sites for a vending facility.

(2) The provisions of paragraph (1) shall not apply (A) when the Secretary and the State licensing agency determine that the number of people using the property is or will be insufficient to support a vending facility, or (B) to any privately owned building, any part of which is leased by any department, agency, or instrumentality of the United States and in which, (i) prior to the execution of such lease, the lessor or any of his tenants had in operation a restaurant or other food facility in a part of the building not included in such lease, and (ii) the operation of such a vending facility by a blind person would be in proximate and substantial direct competition with such restaurant or other food facility except that each such department, agency, and instrumentality shall make very effort to lease property in privately owned buildings capable of accommodating a vending facility.

(3) For the purposes of this subsection, the term "satisfactory site" means an area determined by the

Secretary to have sufficient space, electrical and plumbing outlets, and such other facilities as the Secretary may by regulation prescribe, for the location and operation of a vending facility by a blind person.

(e) State licensing agency in States having vocational rehabilitation plans

In any State having an approved plan for vocational rehabilitation pursuant to the Vocational Rehabilitation Act or the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.], the State licensing agency designated under paragraph (5) of subsection (a) of this section shall be the State agency designated under section 101(a)(1)(A) of such Rehabilitation Act of 1973 [29 U.S.C.A. § 721(a)(1)(A)].

§ 107b. Application for designation as State licensing agency; cooperation with Secretary; furnishing initial stock

A State agency for the blind or other State agency desiring to be designated as the licensing agency shall, with the approval of the chief executive of the State, make application to the Secretary and agree-

(1) to cooperate with the Secretary in carrying out the purpose of this chapter;

(2) to provide for each licensed blind person such vending facility equipment, and adequate initial stock of suitable articles to be vended therefrom, as may be necessary: *Provided, however,* That such equipment and stock may be owned by the licensing agency for use of the blind, or by the blind individual to whom the license is issued: *And provided further,* That if ownership of such equipment is vested in the blind licensee, (A) the

State licensing agency shall retain a first option to repurchase such equipment and (B) in the event such individual dies or for any other reason ceases to be a licensee or transfers to another vending facility, ownership of such equipment shall become vested in the State licensing agency (for transfer to a successor licensee) subject to an obligation on the part of the State licensing agency to pay to such individual (or to his estate) the fair value of his interest therein as later determined in accordance with regulations of the State licensing agency and after opportunity for a fair hearing;

(3) that if any funds are set aside, or caused to be set aside, from the net proceeds of the operation of the vending facilities such funds shall be set aside, or caused to be set aside, only to the extent necessary for and may be used only for the purposes of (A) maintenance and replacement of equipment; (B) the purchase of new equipment; (C) management services; (D) assuring a fair minimum return to operators of vending facilities; and (E) retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time, if it is determined by a majority vote of blind licensees licensed by such State agency, after such agency provides to each such licensee full information on all matters relevant to such proposed program, that funds under this paragraph shall be set aside for such purposes: *Provided, however,* That in no event shall the amount of such funds to be set aside from the net proceeds of any vending facility exceed a reasonable amount which shall be determined by the Secretary;

(4) to make such reports in such form and containing such information as the Secretary may from time to time require and to comply with such provisions as he may from time to time find necessary to assure the correctness and verification of such reports;

(5) to issue such regulations, consistent with the provisions of this chapter, as may be necessary for the operation of this program;

(6) to provide to any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration as provided in section 107d-1 of this title.

§ 107b-1. Access to information with State licensing agencies; election and responsibilities of Committee of Blind Vendors

In addition to other requirements imposed in this title and in this chapter upon State licensing agencies, such agencies shall-

(1) provide to each blind licensee access to all relevant financial data, including quarterly and annual financial reports, on the operation of the State vending facility program;

(2) conduct the biennial election of a Committee of Blind Vendors who shall be fully representative of all blind licensees in the State program,[1] and

(3) insure that such committee's responsibilities include (A) participation, with the State agency, in major administrative decisions and policy and program development, (B) receiving grievances of blind licensees and serving as advocates for such licensees, (C) participation, with the State agency, in the development and administration of a transfer and promotion system for

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[1]So in original. The comma probably should be a semicolon.

blind licensees, (D) participation, with the State agency, in developing training and retraining programs, and (E) sponsorship, with the assistance of the State agency, of meetings and instructional conferences for blind licensees.

§ 107b-2. Omitted

§ 107b-3. Audit of nonappropriated fund activities

The Comptroller General is authorized to conduct regular and periodic audits of all nonappropriated fund activities which receive income from vending machines on Federal property, under such rules and regulations as he may prescribe. In the conduct of such audits he and his duly authorized representatives shall have access to any relevant books, documents, papers, accounts, and records of such activities as he deems necessary.

§ 107c. Repealed, Pub.L. 93-516, Title II, § 205, Dec. 7, 1974, 88 Stat. 1626

§ 107d. Expenditures

(a) Personal services, rent, printing, etc.

The Secretary is authorized to make such expenditures out of any money appropriated therefor (including expenditures for personal services and rent at the seat of government and elsewhere, books of reference and periodicals, for printing and binding, and for traveling expenses) as he may deem necessary to carry out the provisions of this chapter.

(b) Preference to blind persons in employment

The Secretary shall, in employing such additional personnel as may be necessary, give preference to blind persons who are capable of discharging the required duties.

§ 107d-1. Grievances of blind licensees

(a) Hearing and arbitration

Any blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program may submit to a State licensing agency a request for a full evidentiary hearing, which shall be provided by such agency in accordance with section 107b(6) of this title. If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.

(b) Noncompliance by Federal departments and agencies; complaints by State licensing agencies; arbitration

Whenever any State licensing agency determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of this chapter or any regulations issued thereunder (including a limitation on the placement or operation of a vending facility as described in section 107(b) of this title and the Secretary's determination

thereon) such licensing agency may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.

§ 107d-2. Arbitration

(a) Notice and hearing

Upon receipt of a complaint filed under section 107d-1 of this title, the Secretary shall convene an ad hoc arbitration panel as provided in subsection (b) of this section. Such panel shall, in accordance with the provisions of subchapter II of chapter 5 of Title 5, give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5.

(b) Composition of panel; designation of chairman; termination of violations

(1) The arbitration panel convened by the Secretary to hear grievances of blind licensees shall be composed of three members appointed as follows:

(A) one individual designated by the State licensing agency;

(B) one individual designated by the blind licensee; and

(C) one individual, not employed by the State licensing agency or, where appropriate, its parent agency, who shall serve as chairman, jointly designated by the members appointed under subparagraphs (A)

and (B).

If any party fails to designate a member under subparagraph (1)(A), (B), or (C), the Secretary shall designate such member on behalf of such party.

(2) The arbitration panel convened by the Secretary to hear complaints filed by a State licensing agency shall be composed of three members appointed as follows:

(A) one individual, designated by the State licensing agency;

(B) one individual, designated by the head of the Federal department, agency, or instrumentality controlling the Federal property over which the dispute arose; and

(C) one individual, not employed by the Federal department agency, or instrumentality controlling the Federal property over which the dispute arose, who shall serve as chairman, jointly designated by the members appointed under subparagraphs (A) and (B).

If any party fails to designate a member under subparagraph (2)(A), (B), or (C), the Secretary shall designate such member on behalf of such party. If the panel appointed pursuant to paragraph (2) finds that the acts or practices of any such department, agency, or instrumentality are in violation of this chapter, or any regulation issued thereunder, the head of any such department, agency, or instrumentality shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.

(c) Publication of decisions in Federal Register

The decisions of a panel convened by the Secretary pursuant to this section shall be matters of public record and shall be published in the Federal Register.

(d) Payment of costs by the Secretary

The Secretary shall pay all reasonable costs of arbitration under this section in accordance with a schedule of fees and expenses he shall publish in the Federal Register.

§ 107d-3. Vending machine income

(a) Accrual to blind licensee and alternatively to State agency; ceiling on amount for individual licensee

In accordance with the provisions of subjection (b) of this section, vending machine income obtained from the operation of vending machines on Federal property shall accrue (1) to the blind licensee operating a vending facility on such property, or (2) in the event there is no blind licensee operating such facility on such property, to the State agency in whose State the Federal property is located, for the uses designated in subsection (c) of this section, except that with respect to income which accrues under clause (1) of this subsection, the Commissioner may prescribe regulations imposing a ceiling on income from such vending machines for an individual blind licensee. In the event such a ceiling is imposed, no blind licensee shall receive less vending machine income under such ceiling that he was receiving on January 1, 1974. No limitation shall be imposed on income from vending machines, combined to create a vending facility, which are maintained, serviced, or operated by a blind licensee. Any amounts received by a

blind licensee that are in excess of the amount permitted to accrue to him under any ceiling imposed by the Commissioner shall be disbursed to the appropriate State agency under clause (2) of this subsection and shall be used by such agency in accordance with subsection (c) of this section.

(b) Direct competition between vending machine and vending facility; proportion of accrued income from such vending machines for individual licensee

(1) After January 1, 1975, 100 per centum of all vending machine income from vending machines on Federal property which are in direct competition with a blind vending facility shall accrue as specified in subsection (a) of this section. "Direct competition" as used in this section means the existence of any vending machines or facilities operated on the same premises as a blind vending facility except that vending machines or facilities operated in areas serving employees the majority of whom normally do not have direct access to the blind vending facility shall not be considered in direct competition with the blind vending facility. After January 1, 1975, 50 per centum of all vending machine income from vending machines on Federal property which are not in direct competition with a blind vending facility shall accrue as specified in subsection (a) of this section, except that with respect to Federal property at which at least 50 per centum of the total hours worked on the premises occurs during periods other than normal working hours, 30 per centum of such income shall so accrue.

(2) The head of each department, agency, and instrumentality of the United States shall insure compliance with this section with respect to buildings, installations, and

facilities under his control, and shall be responsible for collection of, and accounting for, such vending machine income.

(c) Disposal of accrued vending machine income by State licensing agency

All vending machine income which accrues to a State licensing agency pursuant to subsection (a) of this section shall be used to establish retirement or pension plans, for health insurance contributions, and for provision of paid sick leave and vacation time for blind licensees in such State, subject to a vote of blind licensees as provided under section 107b(3)(E) of this title. Any vending machine income remaining after application of the first sentence of this subsection shall be used for the purposes specified in sections 107b(3)(A), (B), (C), and (D) of this title, and any assessment charged to blind licensees by a State licensing agency shall be reduced pro rata in an amount equal to the total of such remaining vending machine income.

(d) Income from vending machines in certain locations excepted

Subsections (a) and (b)(1) of this section shall not apply to income from vending machines within retail sales outlets under the control of exchange or ships' stores systems authorized by Title 10, or to income from vending machines operated by the Veterans Canteen Service, or to income from vending machines not in direct competition with a blind vending facility at individual locations, installations, or facilities on Federal property the total of which at such individual locations, installations, or facilities does not exceed $3,000 annually.

(e) Regulations establishing priority for operation of cafeterias

The Secretary, through the Commissioner, shall prescribe regulations to establish a priority for the operation of cafeterias on Federal property by blind licensees when he determines, on an individual basis and after consultation with the head of the appropriate installation, that such operation can be provided at a reasonable cost with food of a high quality comparable to that currently provided to employees, whether by contract or otherwise.

(f) Existing arrangements more favorable to blind licensees unaffected

This section shall not operate to preclude preexisting or future arrangements, or regulations of departments, agencies, or instrumentalities of the United States, under which blind licensees (1) receive a greater percentage or amount of vending machine income than that specified in subsection (b)(1) of this section, or (2) receive vending machine income from individual locations, installations, or facilities on Federal property the total of which at such individual locations, installations, or facilities does not exceed $3,000 annually.

(g) Regulating for compliance

The Secretary shall take such action and promulgate such regulations as he deems necessary to assure compliance with this section.

§ 107d-4. Training programs for maximum vocational potential for blind

The Commissioner shall insure, through promulgation of appropriate regulations, that uniform and effective training programs, including on-the-job training, are provided for blind individuals, through services under the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.]. He shall further insure that the State agencies provide programs for upward mobility (including further education and additional training or retraining for improved work opportunities) for all trainees under this chapter, and that follow-along services are provided to such trainees to assure that their maximum vocational potential is achieved.

§ 107e. Definitions

As used in this chapter-

(1) "blind person" means person whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses or whose visual acuity, if better than 20/200, is accompanied by a limit to the field of vision in the better eye to such a degree that its widest diameter subtends an angle of no greater that twenty degrees. In determining whether an individual is blind, there shall be an examination by a physician skilled in diseases of the eye, or by an optometrist, whichever the individual shall select;

(2) "Commissioner" means the Commissioner of the Rehabilitation Services Administration;

(3) "Federal property" means any building, land, or other real property owned, leased, or occupied by any department, agency, or instrumentality of the United States (including the Department of Defense and the United State Postal Service), or any other

instrumentality wholly owned by the United States, or by any department or agency of the District of Columbia or any territory or possession of the United States;

(4) "Secretary" means the Secretary of Education;

(5) "State" means a State, territory, possession, Puerto Rico, or the District of Columbia;

(6) "United States" includes the several States, territories, and possessions of the United States, Puerto Rico, and the District of Columbia;

(7) "vending facility" means automatic vending machines, cafeterias, snack bars, cart services, shelters, counters, and such other appropriate auxiliary equipment as the Secretary may by regulation prescribe as being necessary for the sale of the articles or services described in section 107a(a)(5) of this title and which may be operated by the blind licensees; and

(8) "vending machine income" means receipts (other than those of a blind licensee) from vending machine operations on Federal property, after cost of goods sold (including reasonable service and maintenance costs), where the machines are operated, serviced, or maintained by, or with the approval of, a department, agency, or instrumentality of the United States, or commissions paid (other than to a blind licensee) by a commercial vending concern which operates, services, and maintains vending machines on Federal property for, or with the approval of, a department, agency, or instrumentality of the United States.

§ 107e-1. Repealed. Pub.L. 93-516, Title II, § 205, Dec. 7, 1974, 88 Stat. 1626

§ 107f. Authorization of appropriations

There is authorized to be appropriated such sums as may be necessary for carrying out the provisions of this chapter.